Member Advice

19 February 2024

Workplace Relations

Closing Loopholes Bill No.2 Passed By Parliament

Summary

The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* (**Closing Loopholes No.2 Bill** or **Bill**) was passed by Parliament on 12 February 2024 but is yet to receive Royal Assent.

The Closing Loopholes Bill No.2 deals with various matters that were not addressed in the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, which was passed by Parliament late last year and received Royal Assent on 14 December 2023.

A range of significant amendments were made to the Bill before it passed the Senate on 8 February 2024.

A detailed guide to the Closing Loopholes Act is available on the dedicated workplace relations webpage on the AFRA website.[1] A detailed guide on the Closing Loopholes No.2 Bill is being prepared and will be made available to AFRA members shortly.

Background

The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* (**Closing Loopholes No.2 Bill** or **Bill**) was passed by the Senate on 8 February 2024. It finally passed both Houses of Parliament on 12 February.

The Closing Loopholes No.2 Bill deals with various matters that were not addressed in the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, which was passed by Parliament late last year and received Royal Assent on 14 December 2023.

A significant number of amendments were made to the Bill before it was passed by the Senate. Although many of these changes addressed deficiencies in the Bill as originally introduced into Parliament, there are also a range of amendments that will have a potentially significant impact on industry. These include, among others:

- amendments to introduce a new '*right to disconnect*';
- changes to aspects of the provisions in the *Fair Work Act 2009* (**FW Act**) relating to 'intractable bargaining disputes'; and

[1] To access this Guide, go to [**insert instructions**].

- provisions that empower the Fair Work Commission (**FWC**) to make '*road transport contractual chain orders*' setting minimum standards for certain regulated road transport contractors, road transport employee like workers and other persons in a road transport contractual chain.

The Bill is yet to receive Royal Assent.

What elements are included in the Closing Loopholes No.2 Bill?

A detailed guide to the Closing Loophole No. 2 Bill will shortly be provided to AFRA Members. This advice provides a summary of the key changes and their commencement dates in the interim. A summary of commencement dates is also set out below.

By way of overview, the Closing Loopholes No. 2 Bill, as passed by both Houses of Parliament on 12 February 2024, contains provisions dealing with the following matters of particular relevance:

- **Right to disconnect** – the new provisions:
    - Allow an employee to refuse to monitor, read or respond to contact or attempted contact from their employer or a third party (e.g., a client) outside of the employee's working hours unless the refusal is unreasonable.
    - Empower the FWC to resolve disputes by making stop orders – a breach of which may result in a civil penalty of up to 60 penalty units.
    - Require that modern awards be varied to include a 'right to disconnect term'.
    - Require the FWC to make written guidelines in relation to how this new right operates.
    - Clarify that the right is also a 'workplace right' within the meaning of Pt 3-1 of the FW Act (i.e., the general protections provisions).
- **Casual employment** – the new provisions change the meaning of 'casual employee' under the FW Act; replace the current casual conversion provisions in the national employment standards (**NES**) with a new 'employee choice pathway' to permanent employment and impose new obligations on employers in relation to the provision of a 'casual employment information statement' as set out below:

  Changes to the meaning of 'casual employee'

    - The new provisions amend the existing statutory definition of '*casual employee*' under the FW Act so that it is no longer focused exclusively on the initial offer of employment, but now also encompasses consideration of 'post-contractual conduct'. The changes require that the totality of the relationship, including how it operates in practice, must be considered.
    - More specifically, the new provisions introduce a new definition which will require that an employee is only a casual employee if:
        - the employment relationship is characterised by an absence of *a 'firm advance commitment to ongoing and indefinite work*'; and
        - the employee is entitled to a casual loading or a specific rate of pay for casual employees.
    - The determination of whether a '*firm advance commitment to ongoing and indefinite work*' exists is to be made on the basis of the "r*eal substance, practical reality and true nature of the relationship*", the contract of employment or, in addition to that contract, a non-contractual mutual understanding or expectation between the employer and employee.
    - Specific indicia must be considered in determining whether there is the presence of a relevant '*firm advance commitment*' (noting that no single indicia will be determinative and not all need to be satisfied), including:

  - whether there is an inability of the employer to elect to offer or not offer work or an inability of the employee to elect to accept or reject work (and whether this occurs in practice);
  - whether, having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;
  - whether there are full-time employees or part-time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee; and
  - whether there is a regular pattern of work for the employee.

- Relevantly, a 'note' in the Bill confirms that a regular pattern of work will not of itself determine whether there is a '*firm advance commitment to continuing and indefinite work*'. This is intended to provide that a 'regular pattern of work' does not automatically mean that the employee is or is not a casual employee.
- Amendments made to the Bill as it passed through Parliament clarified that an employee who commences employment under the new statutory definition will remain a casual employee unless the employment was misclassified at the outset or any of the following apply:
  - the employment status is changed to full-time or part-time employment by the employee choice or transitional casual conversion pathways in the FW Act;
  - the FWC makes an order under the new provisions to deal with a dispute about employee choice (or transitional casual conversion) which changes (or converts) the employment status of the employee from a casual employee to a full-time or part-time employee;
  - the employment status is changed to full-time or part-time employment under the terms of a fair work instrument that applies to the employee (e.g., a modern award or enterprise agreement); or
  - the employer makes an alternative offer of employment (other than casual employment) to the employee and the employee commences work for the employer on that basis.

Changes to the existing casual conversion scheme contained in the NES & provision of the 'casual employment information statement'

- The Bill will repeal the current casual conversion pathway in the FW Act and replace it with a single '*employee choice*' pathway under which a casual employee can notify their employer if they believe they should change to permanent employment because they are no longer a 'casual employee' (as defined under the FW Act).
- An employer may refuse an 'employee choice notification' on any of the following grounds:
  - having regard to the statutory definition of a casual employee and the employee's current employment relationship with the employer, that the employee still meets the definition of a casual;
  - there are "*fair and reasonable operational grounds*" for not accepting the notification;
  - accepting the notification would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

- "*Fair and reasonable operational grounds*" for not accepting an employee choice notification include the following:
    - that substantial changes would be required to the way in which work in the employer's enterprise is organised;
    - that there would be significant impacts on the operation of the employer's enterprise;
    - that substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full time employee or part-time employee (as the case may be).
- The right to make an employee choice notification is a workplace right for the purposes of Pt 3-1 of the FW Act (general protections).
- The Bill introduces changes to when a Casual Employment Information Statement must be provided to a casual employee as follows:
    - For medium and large business employers, it must be provided before or as soon as reasonably practicable after employment commences, after 6 and 12 months' service respectively and every 12 months thereafter (if the employee remains employed).
    - For small business employers, it must be provided before or as soon as reasonably practicable after employment commences and again after 12 months' service.

Transitional arrangements for currently engaged casual employees

- Employees engaged as casuals immediately before commencement within the meaning of the casual definition at that time are deemed to be casual employees within the meaning of the new statutory definition. That is the case even if their employment arrangements are inconsistent with the new definition. This means they will remain a casual employee unless the employee changes to part-time or full-time employment through one of the pathways provided for in the FW Act. For example, through the transitional casual conversion pathway, the new employee choice pathway, a process under a fair work instrument or where the employee accepts the employer's offer of part-time or full-time employment.
- Employers of currently engaged casual employees must give a casual employment information statement to those employees within 3 months of this provision commencing.

- **Meaning of 'employee' and 'employer'** – the amendments:
    - Alter the meaning of 'employee' and 'employer' for the purposes of the FW Act by requiring a consideration of the '*real substance, practical reality and true nature of the relationship between the parties*'. The changes are intended to require a consideration of the '*totality*' of the relationship rather than merely the terms of any contract governing it. The intention is to overcome recent High Court decisions that had heavily emphasised the relevance of the terms of any comprehensive written contract in determining the status of a worker as a contractor.[2]
    - Provide a limited ability for contractors to 'opt out' of the application of the new statutory meaning in the period before the provisions commence as follows:

[2] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2

  - If the principal considers the individual's earnings for work under the relationship exceed the contractor high income threshold and that the relationship may become an employment relationship when the new statutory meaning commences, the principal may give the individual a written notice that they can provide an '*opt-out notice*'.
  - If the individual gives an opt-out notice to the principal in response, the new statutory meaning will not apply and the individual's relationship with the principal will continue to be assessed under the previously applicable common law definition (i.e., by reference to a comprehensive written agreement as contemplated by the High Court decisions referred to above).
  - An opt-out notice can only be given once and can be revoked at any time by the individual. The opt-out notice must also contain a statement by the individual that they consider their earnings for work performed under the relationship exceed the contractor high income threshold when it is given.
- The new meaning of '*employee*' and '*employer*' applies to relationships entered into before this provision commences if those relationships continue on that date, as well as those entered into on or after commencement. This means that if a person becomes an employee because of the new meaning under the FW Act, their employment and service before this provision commences does not count for the purposes of entitlements under the FW Act.

- **Bargaining for franchisees** –The amendments enable franchisees of a common franchisor to bargain together for a single-enterprise agreement as 'related employers'. An amendment has also been made to enable franchisees to alternatively make a multi-enterprise agreement if they prefer to, despite now being 'related employers'.
- **Transitioning out of multi-enterprise agreements** – this change gives employers a new ability to transition out of coverage under multi-enterprise agreements by making a single enterprise agreement (see NAT 032/23). However, if employers wish to transition out during the nominal term of a multi-enterprise agreement, they will need the written agreement of each of the unions to whom the multi-enterprise agreement applies before putting the new single enterprise agreement to a vote. If the relevant unions do not provide written agreement, the employer will need to apply to the FWC for a voting request order. The FWC must make a voting request order if the unions' failure to agree was unreasonable in the circumstances and it would not undermine good faith bargaining for the agreement. When the FWC applies the better off overall test, it is applied to the old multi-enterprise agreement and not the modern award.
- **Model terms in enterprise agreements** – this change gives the Full Bench of the FWC the power to determine '*model terms*' concerning flexibility, consultation and dispute resolution in relation to enterprise agreements (see NAT 032/23). Currently, these model terms are prescribed in regulations. The model terms would not override terms agreed to between the parties to an agreement or instrument where the terms meet the requirements of the FW Act.

- **Intractable bargaining workplace determinations** – this change:
  - clarifies what constitutes 'agreed terms,' which are terms included in an intractable bargaining workplace determination as agreed by the bargaining representatives and which are not subject to arbitration by the FWC; and
  - prohibits the FWC from making a determination that includes terms which are *less favourable* to employees or their bargaining representatives as compared to the particular term in the enterprise agreement dealing with that matter.

- **Workplace delegates' rights for regulated workers** – this change is in similar terms to that already passed for employees but applies to gig workers and contractors in the road transport sector. Regulated delegate workers will be given a right to reasonable access to the workplace or facilities provided by the regulated business. However, they will not be given an entitlement to paid time for the purposes of training about their role as a workplace delegate. As is the case for employee worker delegates, the associated regulated businesses would be similarly prohibited from:
    - unreasonably failing or refusing to deal with a workplace delegate;
    - knowingly or recklessly making a false or misleading representation to a workplace delegate; or
    - unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate.
- **Exemption certificates for entry for underpayments** – this change enables officers of a registered organisation (i.e., a union) to obtain an exemption certificate from the FWC to waive the 24 hours' advance notice required for entry to an employer's premises if they suspect a member of their organisation has been or is being underpaid. However, the FWC must reasonably believe that advance notice would prejudice an effective investigation into the suspected contravention (or contravention) to be able to grant an exemption certificate.
- **Underpayment contraventions** – this change:
    - increases maximum penalty amounts for underpayment contraventions for medium and large *body corporate* employers by five for specific underpayment contraventions (i.e., this does not apply to small business employers);
    - in certain circumstances and if an application is made, permits penalties to be alternatively awarded on the basis of 3 x the quantum of the relevant underpayment for medium and large *body corporate* employers if that amount is larger than the maximum penalty amount (i.e., this does not apply to small business employers);
    - increases the penalty for contravening a compliance notice from 30 to 60 penalty units (and to 300 penalty units for medium and large body corporate employers); and
    - alters the current threshold for a '*serious contravention*' of a civil remedy provision.
- **Compliance notices** – this change clarifies the content of compliance notices and the orders that a court may make to remedy non-compliance.
- **De-merger provisions for registered unions** – this change prevents a de-merger ballot being made more than five years after the union amalgamation has occurred.
- **Employee-like workers/Road transport workers (i.e. contractors)** – this change introduces significant new powers for the FWC to regulate independent contractors who are either '*employee-like workers*' performing digital platform work or who are engaged in the road transport industry, including:
    - the ability to set enforceable minimum standards or non-binding guidelines for such workers;
    - granting remedies for unfair deactivation/termination; and
    - the registration of consent collective agreements (struck between a union and business) if they are in the public interest and a power to deal with disputes related to the making of such agreements.
- **Road transport contractual chain provisions** – the FWC will be given very broad powers to make non-binding guidelines and enforceable orders relating to minimum standards to which road transport contractors, road transport employee-like workers and other persons in a 'road

transport contractual chain' are entitled. The orders can deal with commercial arrangements between businesses in the road transport contractual chain.

The Supplementary Explanatory Memorandum to the Closing Loopholes No. 2 Bill indicated that the 'road transport contractual chain':

> *"… would cover a person or business that requires the delivery of freight by road, the driver who makes the delivery and the sub-contracting or other arrangements that sit between then. It would not cover entities in the broader supply chain who may come into possession of the goods via road transport but are not party to a contract for the supply of road transport. For example, a port, intermodal facility, or a storage facility."*

The matters about which the FWC can make a road transport contractual chain order are non-exhaustive but are expressly stated to include the following:

- payment times;
- fuel levies;
- rate reviews;
- termination, including one way termination for convenience; and
- cost recovery.

The matters which cannot be included in road transport contractual chain orders include:

- overtime rates;
- rostering arrangements;
- a term which changes the form of the engagement or the status of regulated workers (including but not limited to deeming them to be an employee); or
- a matter relating to work health and safety which is comprehensively dealt with in Federal / State law which relate to road transport and which is comprehensively dealt with in the Heavy Vehicle National Law or another Federal/State law.

- **Challenges to unfair contractual terms:** The FWC will be given new powers to deal with unfair terms in services contracts to which an independent contractor is a party, where the services contract contains terms which, in an employment relationship, would relate to 'workplace relations matters' as defined under the FW Act. This will be subject to the sum of the contractor's annual rate of earnings (and such other amounts as prescribed) being less than the specified contractor high income threshold in the year the application is made.

  The FWC will be able to issue orders that change or set aside all or part of the services contract. These provisions do not empower the FWC to award financial compensation. However, if a person contravenes an order, they may be liable for a civil penalty of up to 60 penalty units.

  The *Independent Contractors Act 2006* will continue to apply for contactors not eligible to make an application under the unfair contracts jurisdiction in the FW Act.

What are the commencement dates for these changes?

Subject to transitional provisions, the commencement dates for the elements set out above are set out in the table below.

Change	**Commencement date**
Right to disconnect	6 months beginning on the day after Royal Assent (12 months for small business employers)
Changes to casual employment (definition, employee choice , anti-avoidance and small claims proceedings)	6 months beginning on the day after Royal Assent
Meaning of '*employee*' and '*employer*'	6 months beginning on the day after Royal Assent
Opt-out notices for independent contractors relating to the statutory meaning of '*employee*' and '*employer*'	The day after Royal Assent (*Note: ceases when the meaning of 'employee' and 'employer commences – see above)*
Bargaining for franchisees	The day after Royal Assent
Transitioning out of multi-enterprise agreements	The day after Royal Assent
Model terms in enterprise agreements	Proclamation or 12 months beginning on the day after Royal Assent
Intractable bargaining workplace determinations	The day after Royal Assent
Workplace delegates' rights for regulated workers	6 months beginning on the day after Royal Assent
Defence to sham contracting narrowed (employment)	The day after Royal Assent
Exemption certificates for entry for underpayments	1 July 2024
Underpayment contraventions (penalties and serious contravention threshold)	The day after Royal Assent
Compliance notices	The day after Royal Assent
De-merger provisions for registered unions	The day after Royal Assent
Regulated workers (employee-like and road transport)	6 months beginning after Royal Assent

Statutory review

The amendments made by the Closing Loopholes No.2 Bill must be reviewed no later than 2 years after the day it receives Royal Assent.

The report must be given to the Minister within 6 months of that date. It must be tabled in both Houses of Parliament within 15 sitting days of the Minister receiving the report..

Where can I find further information?

A Guide to the changes introduced by the Closing Loopholes No.2 Bill is being prepared and will be made available on the dedicated workplace relations webpage on the AFRA website. Members will be notified once this is available.

What if I require further advice or assistance?

Should members have any questions or require further assistance regarding the changes outlined in this article, please feel free to contact, Brent Ferguson, Ai Group's Head of National Workplace Relations Policy on brent.ferguson@aigroup.com.au.

Members are also encouraged to attend one of a series of briefings covering these changes that Ai Group will be running in March 2024. Further details will be sent to members shortly.

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